

PATENT

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K. Jeffrey de Hart

Applicant : Van de Sande, Marinus L. W. Confirmation No. 8999
Application No. : 10/533,348
Filed : April 29, 2005
Title : DEVICE FOR ARRANGING AT LEAST TWO BANDS AROUND
ONE OR MORE PACKETS

Grp./Div. : 3721
Examiner : Lindsay M. Low

Docket No. : 54950/A394

APPELLANT'S BRIEF

Mail Stop Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Post Office Box 7068
Pasadena, CA 91109-7068
December 2, 2008

Commissioner:

1. REAL PARTY IN INTEREST

The real parties in interest are:

1. Endra B.V., the owner of this application pursuant to an assignment; and
2. Inventor: Marinus Lambertus Wilhelmus van de Sande

2. RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences presently pending.

3. STATUS OF CLAIMS

Claims 1 and 3-9 are pending in the application, with claims 7-9 being withdrawn from consideration. Claim 2 was canceled by an Amendment dated April 24, 2007. No claims have been allowed. The rejection of claims 1 and 3-6 is on appeal.

4. STATUS OF AMENDMENTS

None.

5. SUMMARY OF CLAIMED SUBJECT MATTER

The appealed claims include independent claim 1. Appealed claim 1 is directed to a device for arranging at least two bands B1, B2 around one or more packets comprising: supply reels having a supply roll 3,4 for a band of the strap type and a supply roll for a band of the film type (FIG. 1; page 5:1-4); a frame 1 in a lying conveyor belt 2 supported by the frame for moving the packets forward (FIG. 1; page 4:27-32); band clamping and guiding means 7, 8 which move transversely of the conveyor belt away from and toward each other and which are connected to associated supply reels for the at least two bands, the band clamping and guiding means further are arranged for applying simultaneously the strap type band and the film type band one above the other around the one or more packets such that each band can be sought, fixedly clamped, welded together and separated (FIGs. 4A-5E, page 6:21-page 7:16); welding means 7, 8 for welding together the bands which have been moved toward each other (FIG. 1, page 5:12-14); and the at least two types of bands comprising a band of the strap type and a band of the film type, wherein the band clamping, guiding means and welding means include a first group of band clamping and guiding means having a first pair of welding and clamping jaws arranged for the band of the strap type and a second group of band clamping and guiding means having a second pair of welding and clamping jaws arranged for the band of the film type, which groups arranged one above the other (FIG. 5A, page 7:3-16).

"Band clamping and guiding means" are defined in the specification as "a first group of band clamping and guiding means which has a first pair of jaws for a first band type and second group which has a second pair of jaws for a second band type, which groups are arranged one above the other" (FIGs. 1, 4A, 5A; page 1:26-30).

"Welding means" are defined in the specification as "[b]oth ends of band B1 and film B2 respectively are in each case welded together at 9 and 10 respectively. The clamping and welding jaws 7, 8 are moved toward each other, wherein band B1 and film B2 are nestled under tension against the rear side of the packets P for strapping. (FIGs. 1, 4A, 5A; page 5:11-15).

6. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

1) Whether the Examiner erred in rejecting claims 1, 4 and 5 under 35 U.S.C. § 103(a) as being obvious over Van der Wal (US 3,950,203), Simeone (US 3,345,918) and Admitted Prior Art (APA).

2) Whether the Examiner erred in rejecting claim 3 under 35 U.S.C. § 103(a) as being obvious over Van der Wal (US 3,950,203), Simeone (US 3,345,918) and Admitted Prior Art (APA) and in further view of Odenthal (US 5,735,104).

3) Whether the Examiner erred in rejecting claim 6 under 35 U.S.C. § 103(a) as being obvious over Van der Wal (US 3,950,203), Simeone (US 3,345,918) and Admitted Prior Art (APA) and in further view of Odenthal (US 5,551,212).

7. ARGUMENT

The Examiner Failed to Establish a *Prima Facie* Case of Obviousness in Rejecting Claims 1 and 3-6.

The examiner bears the initial burden of factually supporting any *prima facie* conclusion of obviousness. To reach a proper determination under 35 U.S.C. 103, the examiner must step backward in time and into the shoes worn by the hypothetical "person of ordinary skill in the art" when the invention was unknown and just before it was made. In view of all factual information, the examiner must then make a determination whether the claimed invention "as a whole" would have been obvious at that time to that person. *MPEP 2142*. The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also indicates the results would have been predictable to one of ordinary skill in the art. *MPEP 2143.01 (emphasis in original)*; *KSR v. Teleflex*, 550 U.S. 398, 82 USPQ2d 1385, 1396 (2007).

Additionally, to establish *prima facie* obviousness of a claimed invention, if not all the claim limitations are taught or suggested by the prior art, Office personnel must explain why the difference(s) between the prior art and the claimed invention would have been obvious to one of ordinary skill in the art. *MPEP 2141(III)*. The key to supporting any rejection under 35 U.S.C. 103 is the clear articulation of the reason(s) why the claimed invention would have been obvious. The Supreme Court in *KSR* noted that the analysis supporting a rejection under 35 U.S.C. 103 should be made explicit. *Id* (emphasis added). The Court quoting *In re Kahn*, 441 F.3d 977,

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988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006), stated that "[R]ejections on obviousness cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *KSR v. Teleflex*, 82 USPQ2d at 1396 (2007) (emphasis added); *MPEP 2141(III)*.

The Van der Wal reference

Van der Wal is directed to a method and a device for applying a tape around one or more objects, in which first a tape consisting of two interconnected tapes is passed in U-shaped fashion around the object or objections; thereafter the two tape portion extending beyond the object or objects are moved towards one another and pressed on against the other by means of movable tape strainers; thereupon the tape portions are cut in the contact area and finally the formed tape end portions are interconnected in pairs, in such a manner that the interconnected end portions in the plane of the tape of which they form part. ABSTRACT. FIG. 1, reproduced below, is representative of the device disclosed by Van der Wal.

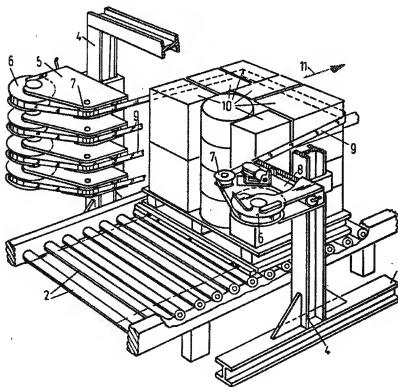


FIG.1

Van der Wal describes the device for applying tape around an object in more detail with reference to FIG. 1, as follows:

[R]eference numeral 1 designates a stationary base frame, 2 a roller track for conveying loading boards 3 (palets) and 4 columns disposed on both sides of the roller track 2 on the base frame 1 and being adjustable in a direction of height. Each column 4 holds four taping devices 5, some of which are omitted. Each taping device 5 comprises a holder slidably and fixably arranged on a column for a tape supply reel 6, a guide roller 7 and a composite tape strainer 8. Every taping device 5 of one column 4 co-operates with a taping device of the other column. The two co-operating taping devices are located at the same height above the roller track 2.

Col. 3:65-Col. 4:9. As indicated by FIG. 1, illustrating the sole embodiment disclosed by Van der Wal, while Van der Wal may disclose a plurality of identical tape supply reels, Van der Wal does not disclose a device for simultaneously applying more than one different tape at a time.

The Simeone reference

Simeone is directed to a tear-strip processing apparatus for preparing wrappers with conveniently exposed tear strips when in place about wrapped materials, such as hard candy. FIG. 1 is a perspective view of round-shaped hard candy having a wrapper processed by the apparatus of the Simeone disclosure, FIG. 2 illustrates a package of round-shaped hard candy prior to being wrapped with a tear-strip wrapper processed by the apparatus of the Simeone disclosure and FIG. 4 is a schematic view of the processing scheme of the Simeone apparatus. The three figures are reproduced below.

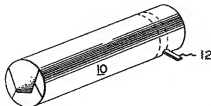


FIG.1

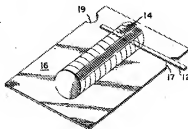


FIG.2

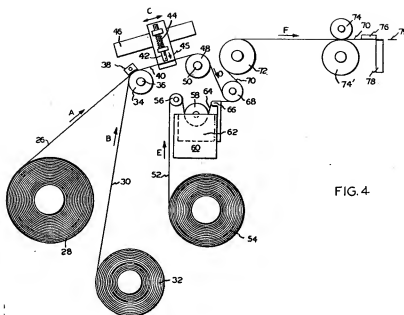


FIG. 4

Someone discloses a processing scheme in which wrapping material 26 and an underlapping layer 30 simultaneously advance from supplies 28, 32, respectively, through a heating element 38 to fuse the underlapping layer 30 to the outer wrapping material 26 to form a web. Subsequently, a tear strip 52 is waxed and joined with the web 40 to form a completed tear-strip. *Col. 2:23-68.*

The Final Office action

In rejecting claims 1, 4 and 5 in the Final Office action dated June 2, 2008, the Examiner references earlier Office actions for the basis of rejecting claim 1 based on Van der Wal. *6/2/08 Final Office action, p. 2.* More specifically, the Examiner notes that "Van der Wal's invention has at least two bands as shown in Fig. 1. In addition, each band and clamping means (Figs. 2-8) is capable of holding different types of bands, such as metal, another fusible material, or non-fusible material (col. 1 lines 65-69 and col. 3 lines 31). Therefore, the bands can be considered to be of the film type or the strap type. *6/18/07 Final Office action, p. 3.* Further the Examiner notes that "Van der Wal states in col. 1 line 65 - col. 2 line 1 and col. 3 lines 31-33 that this single device can be used for applying different kinds of bands around the packages. Therefore,

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the device includes and is capable of applying two different kinds of bands at the same time or combination thereof." *6/18/07 Final Office action, p. 4.*

The Examiner concedes that Van der Wal is silent about simultaneously applying a strap type band and a film type band around a packet. *6/2/08 Final Office action, p. 2.* However, the Examiner states that "Simeone teaches applying a strap type band 12 and a film type band 16 simultaneously to a packet for the purpose of facilitating opening of the packet (see col. 1 lines 12-16). Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to simultaneously apply a strap type band a film type band to Van der Waal's [sic] packet for the purpose of facilitating opening of the packet." *6/2/08 Final Office action, p. 2.*

In an Advisory action dated August 11, 2008, the Examiner notes that "Examiner asserts that Simeone is relied upon to show the use of applying two different bands at the same time. It is acknowledged that Van der Wal and Simeone operate differently, however both devices apply two bands around a packet. Therefore it would be within the abilities to one having ordinary skill in the art to recognize that simultaneously applying two different types of bands would aid in facilitating opening of the packet." *8/11/08 Advisory action, p. 2.*

The Examiner further notes that "[i]n the alternative, Simeone discloses the same invention including supply reels having a supply roll for each a band of the strap type and a band of the film type (see Fig. 4). Simeone is silent about having a conveyor belt, frame, band clamping and guiding means, and welding means. However, Van der Waal [sic] teaches a conveyor 2 for moving packets along, a frame 4 for supporting the supply rolls, and band clamping, guiding, and welding means (see figures) for sealing the bands together. Therefore it would have been obvious to one having ordinary skill in the art at the time of the invention to provide Simeone's device with a conveyor, frame, and band clamping, guiding, and welding means for the purpose of supporting Simeone's packets and supply reels and also to properly seal the bands together." *6/2/08 Final Office action, pp. 2-3.*

The claimed invention

Claim 1

Claim 1 recites in relevant part (emphasis added): "A device for arranging at least two bands around one or more packets comprising:

supply reels having a supply roll for a band of the strap type and a supply roll for a band of the film type; . . .

band clamping and guiding means which move transversely of the conveyor belt away from and toward each other and which are connected to associated supply reels for the at least two bands, the band clamping and guiding means further are arranged for applying simultaneously the strap type band and the film type band one above the other around the one or more packets such that each band can be sought, fixedly clamped, welded together and separated . . .

and the at least two types of bands comprising a band of the strap type and a band of the film type, wherein the band clamping, guiding means and welding means include a first group of band clamping and guiding means having a first pair of welding and clamping jaws arranged for the band of the strap type and a second group of band clamping and guiding means having a second pair of welding and clamping jaws arranged for the band of the film type, which groups are arranged one above the other."

All of the claim limitations are not taught or suggested by the cited prior art, nor does the Examiner articulate reasoning why their difference would have been obvious.

Additionally, to establish *prima facie* obviousness of a claimed invention, if not all the claim limitations are taught or suggested by the prior art, Office personnel must explain why the difference(s) between the prior art and the claimed invention would have been obvious to one of ordinary skill in the art. *MPEP 2141(III)*. As noted above, the Examiner concedes that Van der Wal is silent about simultaneously applying a strap type band and a film type band around a packet. *6/2/08 Final Office action, p. 2*. Thus, the Examiner cites Simeone stating that "Simeone teaches applying a strap type band 12 and a film type band 16 simultaneously to a

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packet for the purpose of facilitating opening of the packet (see col. 1 lines 12-16)." 6/2/08 *Final Office action*, p. 2.

A "band" as used and understood by one of skill in the art in the context of claim 1 is defined as "A thin strip of flexible material used to encircle and bind one object or to hold a number of objects together: *a metal band around the bale of cotton.*" *The American Heritage Dictionary of the English Language, Fourth Edition, 2006* (emphasis added). Another definition of "band" is "a fillet, belt, or strap: *a band for the hair; a band for connecting pulleys.*" *Dictionary.com Unabridged (v 1.1), based on the Random House Unabridged Dictionary, 2006*. As is evident from the definitions of "band," while a band may be used to encircle an object, a band is not configured to entirely enclose an object.

Simeone teaches a processing apparatus for a wrapper for a packet of material having a tear-strip to free the contained packet from the wrapper. An example of a packet of material (hard candy) having a wrapper processed by the apparatus disclosed by Simeone is shown in FIG. 1 (reproduced above). Clearly, the wrapper encloses the entire packet of material, and in fact, the tear-strip is used to free the enclosed packet from the wrapper. As such, the wrapper 16 processed by the processing apparatus of Simeone is not a "band," consistent with the definitions provided above. Accordingly, Simeone does not teach "supply reels having a supply roll for a band of the strap type and a supply roll for a band of the film type," as recited in claim 1. Although the Applicant appreciates that the claims must be accorded their broadest reasonable interpretation consistent with the specification, even the broadest definition of "band" cannot be read onto the wrapper 16 of Simeone.

Since Simeone does not teach two types of bands, the Examiner must articulate reasoning with some rational underpinning to support the legal conclusion of obviousness, and not provide mere conclusory statements. However, the Examiner has not provided any reasoning for the lack of a teaching of two types of bands in Simeone, but rather merely concludes that the wrapper is a band.

Simeone teaches away from being combined with Van der Wal.

Even if the wrapper 16 of Simeone could be considered a "band," which it is not, Applicant notes that the Examiner has not established a *prima facie* case of obviousness of combining Van der Wal with Simeone because Simeone teaches away from being combined with Van der Wal. A prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention. *W.L. Gore & Assoc., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 220 USPQ2d 303 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984); *MPEP 2141.03(VI)* (emphasis in original).

On the one hand, as shown in FIG. 1 of Van der Wal, Van der Wal teaches that "[w]hen a loading board 3 with an object or a stack of objects 10 is displaced in the direction of the arrow 1 along the roller track 2, the tape 9 is applied in the form of a U around the stack of objects 10 in the manner shown in FIG. 1." *Col. 4:13-18*. Further, while Van der Wal may disclose that the device may use "tapes of metal or other fusible material," Van der Wal does not teach or suggest that more than one of these types of material can be arranged around the packet with a single machine.

On the other hand, Simeone teaches a wrapper processing apparatus for preparing a wrapper to wrap a packet of material as shown in FIG. 1. Applicant notes that the packet of material wrapped in FIG. 1 is wrapped entirely around the packet and is not "in the form of a U" or even merely encircled around the packet.

In the process of preparing the wrapper disclosed by Simeone, a tear-strip 52 is waxed and is then adhesively applied to the wrapping web 40 to provide a complete wrapper 79. *Col. 2:53-69*. By teaching that the two "bands" must be attached to each other, Simeone expressly teaches away from "the band clamping and guiding means further are arranged for applying simultaneously the strap type band and the film type band one above the other around the one or more packets such that each band can be sought, fixedly clamped, welded together and separated," as recited in claim 1.

Although taken completely out of context of the specification, the Examiner may interpret the language above as meaning that the strap type band the film type band could be layered on top of each other, rather than, as intended, spaced above one another on the packet.

However, claim 1 further recites "wherein the band clamping, guiding means and welding means include a first group of band clamping and guiding means having a first pair of welding and clamping jaws arranged for the band of the strap type and a second group of band clamping and guiding means having a second pair of welding and clamping jaws arranged for the band of the film type, which groups are arranged one above the other." As such, clearly the language of claim 1 indicates that "one above the other" means that the strap type band the film type band are separate and spaced from each other on the packet. As such, Simeone's disclosure of the tear strip attached to the wrapper teaches away from a combination with the device of Van der Wal in view of the language of claim 1.

Hindsight must be avoided.

Impermissible hindsight must be avoided and the legal conclusion of obviousness must be reached on the basis of the facts gleaned from the prior art. See *MPEP 2142*.

A band of the strap type is typically made of a polypropylene (PP) or a polyethylene terephthalate (PET) material with a relatively small width, typically 3 to 25 mm, and a thickness of about 0.25 to 2 mm. A band of the film type is typically flexible and made of polyethylene (PE). The band of the film type is usually relatively wide, about 50 to 2,000 mm and has a thickness of about 30 to 250 micrometers. It is well known that a band of the strap type and a band of the film type require very different sealing processes and a different tensioning.

Machines for arranging a band of the strap type have been known for more than 30 years. Machines for arranging a band of the film type have been known for more than 50 years. However, until the invention of the present application, no machine existed for arranging both a band of the strap type and a band of the film type around a packet with a single machine.

As noted above, the "Examiner asserts that Simeone is relied upon to show the use of applying two different types of bands at the same time." *8/11/08 Advisory action, p. 2*. Although the Examiner concedes that Van der Wal and Simeone "operate differently," with the benefit of hindsight in view of the Applicant's claim, disclosure and drawings it may be possible to "see" the Applicant's invention by combining the wrapper of Simeone with the device of Van der Wal. However, the Examiner is not permitted to use hindsight to reach the legal conclusion

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that a device for arranging at least two bands around one or more packets as claimed in claim 1 is obvious over a device for applying a single type of tape around an object in the form of a U in view of an apparatus for processing a tear strip attached to a wrapper for completely enclosing a packet that allows the tear-strip to free the packet from the wrapper.

Combining Van der Wal with Simeone would not work.

Although the Applicant maintains, for the reasons stated above, that neither Van der Wal nor Simeone teach all of the limitations of claim 1, that Simeone teaches away from a combination with Van der Wal, and that hindsight is necessary to combine the references regardless of which is used as a primary reference, Applicant also disagrees with the Examiner's assertion that one of skill in the art could modify Simeone's device with a conveyor, frame, band clamping, guiding and welding means as disclosed in Van der Wal for the purpose of supporting the candy and supply reels and also to properly seal the wrapper and tear-strips together. It is respectfully submitted that the recited combination would not result in the claimed invention, as the conveyor belt, frame, band clamping and guiding means and welding means of Van der Wal would not work in Simeone because the Van der Wal components apply bands one above the other and not layered with each other, as is required in Simeone. This is necessary to have the tear-strip below on top of the wrapper to aid in opening the wrapper to expose the candy. Further, as noted above, Van der Wal teaches arranging the tape "in the form of a U," which would not be suitable to for wrapping and sealing entire packets as shown in Simeone.

Accordingly, all of the limitations in claim 1 are neither present in Van der Wal or Simeone, nor are an obvious result from a reasonable combination of their teachings. As such, claim 1 is patentable over Van der Wal in view of Simeone.

Claims 4 and 5 are dependent on claim 1. As such, these claims are allowable based on claims 1 for at least the reasons recited above and for the additional limitations they contain.

Claims 3 and 6

Claims 3 and 6 have been rejected as obvious in view of Van der Wal, Simeone, admitted prior art, the '104 Odenthal reference and the '212 Odenthal reference. This rejection is

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respectfully traversed. Neither '104 Odenthal nor '212 Odenthal disclose the deficiencies of Van der Wal or Simeone, but has only been cited as disclosing bands of different widths or bands which can be embossed or printed upon ('104 Odenthal) and as having a band with a label ('212 Odenthal). Therefore, since claims 3 and 6 depend from claim 1, claims 3 and 6 are allowable for at least the reasons recited above and for the additional limitations they contain.

8. CLAIM APPENDIX

1. A device for arranging at least two bands around one or more packets comprising:
supply reels having a supply roll for a band of the strap type and a supply roll for a band of the film type;

a frame in a lying conveyor belt supported by the frame for moving the packets forward;
band clamping and guiding means which move transversely of the conveyor belt away from and toward each other and which are connected to associated supply reels for the at least two bands, the band clamping and guiding means further are arranged for applying simultaneously the strap type band and the film type band one above the other around the one or more packets such that each band can be sought, fixedly clamped, welded together and separated;

welding means for welding together the bands which have been moved toward each other; and

the at least two types of bands comprising a band of the strap type and a band of the film type, wherein the band clamping, guiding means and welding means include a first group of band clamping and guiding means having a first pair of welding and clamping jaws arranged for the band of the strap type and a second group of band clamping and guiding means having a second pair of welding and clamping jaws arranged for the band of the film type, which groups are arranged one above the other.

2. (Canceled)

3. The device as claimed in claim 1, characterized in that the second band is wider than the first band.

4. The device as claimed in claim 1, characterized in that each jaw of the first pair of jaws has a clamping surface which runs transversely relative to the direction of movement and which co-acts with a counter-surface of an intermediate body carried by one of the jaws, wherein at least one of the surfaces is provided with tooth-like protrusions lying in a direction opposite to the pulling direction.

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5. The device as claimed in claim 1, characterized in that each jaw of the second pair of jaws has a guide surface which runs transversely relative to the direction of movement and which co-acts in each case with a motor-driven supply roll.

6. The device as claimed in claim 1, characterized in that one of the band types is provided with a label.

7. (Withdrawn) Method for arranging at least two bands one above the other around one or more packets, wherein each band, which is formed by fastening together at their outer ends two bands unrolled in each case from a supply roll, is trained in a U-shape round the or each packet, whereupon each pair of band portions extending around the or each packet in a U-shape are pressed toward each other along the object, adhered to each other and severed such that a band again extends between each pair of supply rolls, characterized in that the type of the at least two bands is chosen according to the height on the one or more packets, and that for each band each of the two band portions pressed toward each other is fixedly clamped, moved toward each other, welded together and separated.

8. (Withdrawn) Method as claimed in claim 7, characterized in that each band of the bands to be arranged one above the other is fixedly clamped, welded together and separated simultaneously and in one movement.

9. (Withdrawn) Method as claimed in claim 7, characterized in that each band of the bands to be arranged one above the other is successively sought, fixedly clamped, welded together and separated.

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9. EVIDENCE APPENDIX

None.

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10. RELATED PROCEEDING APPENDIX

None.

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In view of the foregoing amendments and remarks, it is respectfully submitted that the Application is now in condition for allowance, and, accordingly, early indication is respectfully requested.

Respectfully submitted,

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OSB/kjd

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